

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6114 *Original + Affidavit of Mailing*

To Be Argued By
Cyril Hyman

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

B

FRIENDSHIP DAIRIES, INC., POLLIO DAIRY PRODUCTS
CORP., CROWLEY FOODS, INC., QUEENSBORO FARM
PRODUCTS INC., SARATOGA DAIRY, INC., DELTOWN
FOODS, INC., ELMHURST MILK AND CREAM CO., INC.,
QUEENS FARMS, INC., and CUBA CHEESE AND TRADING
CO., INC.,

Plaintiffs-Appellants,

- against -

EARL BUTZ, Secretary of the Department of
Agriculture of the United States,
Defendant-Appellee,

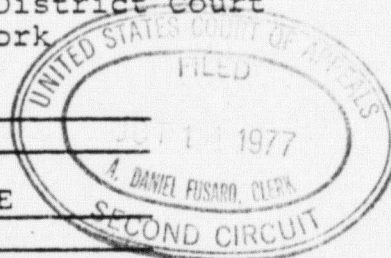
P/S

- and -

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,
Intervenor-Appellee.

On Appeal From the United States District Court
For The Eastern District of New York

BRIEF OF
FEDERAL APPELLEE



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NATURE OF THE CASE

Appellants, who were plaintiffs below, are nine manufacturers of milk products located in the State of New York. Under the provisions of the Agricultural Marketing Agreements Act of 1937, as amended (7 U.S.C. 601 et seq.), the Secretary of Agriculture (hereinafter the "Secretary") is empowered to establish milk marketing orders in various regions to regulate the minimum price which milk processors, usually referred to as "handlers", must pay farmers, usually referred to as "producers" 1/. The appellants here are affected by the minimum prices established by the Secretary for milk in the New York-New Jersey Milk Marketing Area 2/ (7 CFR Part 1002, hereinafter "Order No. 2"). In 1974 the

1/ For purposes of Order 2 the definitions of "handler" and "producer" appear in sections 1002.7 and 1002.6 respectively of Title 7 of the Code of Federal Regulations. Two of the appellants here, Cuba Cheese and Trading Company and Pollio Dairy Products Corporation, do not meet the requirements for the definition of a handler under section 1002.7 in that they do not operate a "pool plant" and are not regulated handlers under the order. However, the Court below found that the price paid by these two manufacturers for the milk they purchased is directly affected by the prices established under Order No. 2 and that they therefore have standing to remain in the suit (1457a). For the sake of consistency all appellants will be referred to as "handlers".

"A" references are to the Joint Appendix.

2/ Notwithstanding Appellants' contention that Order No. 2 establishes "the minimum prices which Appellants must pay farmers", the provisions of that Order do not require any of these handlers to purchase milk regulated under the Order (1245a-1247a). While it may be correct that, as appellants contend, practical considerations of State health regulations and availability of supply (1248a-1249a), in effect, require that they purchase Order No. 2 milk, there is no requirement under the terms of the Order itself which bind them to do so.

Secretary of Agriculture amended eight milk marketing orders 3/ located in the northeastern United States, including Order No. 2. These amendments modified the formulas used in the eight Orders to establish the minimum price for milk utilized in manufacturing dairy products. Appellants challenged the amendment to Order No. 2.

Initially, in April 1974, these handlers, along with Lehigh Valley Cooperative Farmers ("Lehigh"), 4/ had sought an injunction from the District Court for the District of Columbia to prevent the implementation of the amendments to their respective orders; however, the District

3/ The eight orders which were the subject of the amendment proceeding were: Boston Regional, 7 CFR Part 1001, Docket No. AO-14-A53; New York New Jersey, 7 CFR Part 1002, Docket No. AO-71-A68; Middle Atlantic, 7 CFR Part 1004, Docket No. AO-160-A51; Connecticut, 7 CFR Part 1015, Docket No. AO-305-A31; Ohio Valley, 7 CFR Part 1033, Docket No. AO-166-A44; Eastern Ohio-Western Pennsylvania, 7 CFR Part 1036, Docket No. AO-179-A39; Southern Michigan, 7 CFR Part 1040, Docket No. AO-225-A28; Indiana, 7 CFR Part 1049, Docket No. AO-319-A22. ("Notice of Hearing on Proposed Amendments To Tentative Marketing Agreements and Orders", pp. 2a-18a).

4/ Lehigh is a handler and a cooperative association of nearly 1000 farmers, 675 of whom are producers as defined by the provisions of the Middle Atlantic Milk Marketing Order (7 CFR Part 1004, hereinafter "Order No. 4"). Lehigh took part in the rule making proceeding and opposed any amendment to Federal Order No. 4. Following the announcement of the Secretary's Partial Decision on March 29, 1974 (39 Federal Register 11567), Lehigh filed suit in the District Court, under the caption "Lehigh Valley Cooperative Farmers v. Earl Butz, Secretary of Agriculture", Civil Action No. 74-515, seeking to enjoin implementation of the amendment to Order No. 4. After the District Court issued its Joint Opinion dismissing both Lehigh's and Appellant's suit for injunction (see footnote 5), Lehigh filed a petition

Court refused to issue such an injunction. 5/ Appellants and Lehigh then filed Petitions for Administrative Review, pursuant to the provisions of 7 U.S.C. 608c(15)(A), before the Secretary of Agriculture and requested interim relief pending the outcome of such review. The Judicial Officer for the Department denied the request for Interim Relief for the reasons set forth by Judge Flannery in denying the request for injunctive relief (1165a, see Footnote 5). After an oral hearing on July 1, 1974 (1171a - 1283a), the Administrative Law Judge issued a lengthy Initial Decision (1286a-1343a) in which he found that the Secretary had complied with all requirements of procedural due process

Footnote 4 - continuation

under 7 U.S.C. 608c(15)(A) for a review before the Secretary of Agriculture. Lehigh's Petition was consolidated by the Administrative Law Judge with Appellants' Petition and the proceeding was conducted as a joint challenge under the caption In re: Cuba Cheese Company, et al., AMA Docket No. M 2-46, et seq. After the Administrative Law Judge's Initial Decision adverse to the Petitioners, Lehigh did not pursue an appeal to the Judicial Officer.

5/ Judge Flannery of the District of Columbia District Court issued a joint opinion in the case of Lehigh Valley Cooperative Farmers v. Butz, Civil Action No. 74-515, and Crowley's Foods, Inc., et al. v. Earl Butz, Civil Action No. 74-516, in which he found:

1. The Court is not able to grant plaintiff's interim relief or otherwise stay the Secretary of Agriculture's order inasmuch as plaintiffs had failed to prove: (a) that they are likely to prevail on the merits; (b) that without such relief they will suffer irreparable injury; (c) that the granting of the stay will not result in substantial harm to other interested persons; and (d) that the public

in conducting the rule making hearing and that the amendments were based upon substantial evidence in the record. The Administrative Law Judge therefore dismissed the Petitions. The handlers appealed the Initial Decision to the Department of Agriculture's Judicial Officer (1344a-1346a); 6/ after a review of the record the Judicial Officer, with some minor editorial changes, adopted the Initial Decision of the Administrative Law Judge as the Final Decision of the Secretary (1347a-1353a). The handlers then sought review of the Final Decision, pursuant to the provisions of 7 U.S.C. 608c(15)(B), before the District Court for the Eastern District of New York. Judge Neaher, of the District Court, reviewed the record of the Rulemaking Proceeding and the Administrative Proceeding before the Secretary and, after consideration of the briefs submitted by the parties, ruled that "the Secretary properly exercised his authority in this case,

Footnote 5 - continuation

interest will not be harmed by the granting of such relief. Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); Eastern Air Lines v. Civil Aeronautics Board, 261 F.2d 830 (2nd Cir. 1958); and Interstate Milk Producers' Cooperative, Inc. v. St. Clair, 314 F. Supp. 108 (D.C. Md. 1970).

2. Having denied plaintiff's request for emergency interim relief, the court is without jurisdiction to consider the various procedural deficiencies and due process questions plaintiff alleged prior to plaintiff's exhaustion of the administrative remedies available to them pursuant to 7 U.S.C. (§608c(15)). See, United States v. Ruzicka, 329 U.S. 287 (1946). . . .

6/ The Judicial Officer has been duly delegated to act for the Secretary in these matters. See Brown v. United States, 367 F.2d 907, 911 (10 Cir. 1966), cert denied, 387 U.S. 917 (1967).

for there is substantial evidence in the record and his actions were in accordance with law". (1490a). The Court therefore granted the Appellees' Motion for Summary Judgment dismissing the Complaint. This appeal has been taken from that Decision.

COUNTERSTATEMENT OF THE ISSUES

In the opinion of the appellees, a review of the Decision of the District Court involves the following issues:

I. Whether the Court below properly found that there was substantial record evidence to support the Secretary's Decision to amend Order No. 2 to alter the existing pricing formula for establishing the minimum value of milk going into manufacturing dairy products.

II. Whether the Court below properly found that a challenge to the validity of the Minnesota-Wisconsin Series Price ("M-W price") was beyond the scope of the rulemaking hearing convened to consider the need for amending the then existing pricing formula for reserve milk, which priced such milk at the lower of either the butter powder price ("b-p price") or the M-W price.

III. Whether the Court below properly determined that there existed substantial evidence on the record to support the Secretary's decision that it was necessary to amend the eight northeastern milk marketing orders so as to equate the minimum price for milk going into manufactured dairy products under those orders with the prices established under the majority of other Federally regulated marketing orders as well as the price being paid by unregulated plants in Minnesota and Wisconsin.

STATEMENT OF FACTS

Economic Background and Operations of
the Federal Milk Marketing Orders

This case arises out of the Federal regulation of the milk industry through the use of milk marketing orders, each of which consists of a series of complex regulations controlling the marketing of milk in a given geographical region. Reacting to the deterioration of the free market economy in the milk industry, the structure of which, as the Supreme Court has stated, "is so eccentric that economic controls have been found at once necessary and difficult," H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 529 (1949), Congress enacted the Agricultural Marketing Agreement Act of 1937, which can now be found, as amended, in 7 U.S.C. §601-674.

The necessity for regulating the handling of milk arises from the singular problems of the dairy industry. Fluid milk must be consumed relatively quickly after it is produced because it is naturally "a fertile field for the growth of bacteria" United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533, 549 (1939). If it cannot be marketed quickly in fluid form, it must be manufactured into cheese, butter, or other milk products which can be stored for longer periods. Such manufactured milk, which cannot be disposed of in fluid form, is referred to in the trade as surplus or reserve milk. Reserve milk commands a lower price on the market than fluid milk because it must be manufactured

into milk products that compete directly with similar products from across the nation, often manufactured from milk of lower quality and in "low cost production areas far removed from metropolitan centers." Id. at 550.

Naturally, every farmer would prefer to sell his milk to the high value fluid users, but this desire cannot be fulfilled for several reasons. First, the daily demand for fluid milk varies considerably. If the distributors (handlers) are to meet this varying demand, supplies or reserve milk must always be available. That portion of the additional supplies not actually needed and used in fluid form is, of course, "surplus" to fresh beverage milk needs.

Under the best practical adjustment of supply to demand the industry must carry a surplus of about 20 percent, because milk, an essential food, must be available as demanded by consumers every day in the year and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control Nebbia v. New York, 291 U.S. 502, 517 (1934).

Second, dairy cows produce more milk in the spring than they do in the fall. Dairy herds sufficient to produce a supply of milk adequate for consumer needs in the fall produce a super-abundance in the spring. For this reason there is always reserve milk, although the amount of the reserve may vary between markets. 7/

7/ At page 6 of Appellants' Brief they state: "Because the price established for 'Class I' milk is always substantially higher than the price for 'Class II' milk, 'Class II' milk is also referred to

In the early 1930's, the availability of this reserve milk for sale in the more profitable fluid market resulted in extreme cutthroat competition which engendered business practice that jeopardized "the quality and in the end the quantity" of the vital fluid milk supply. United States v. Rock Royal Co-Operative, Inc., supra, 307 U.S. at 550. The provisions of the Agricultural Marketing Agreement Act relating particularly to the milk industry were enacted as "the result of nation-wide distress which had culminated in a milk farmers' 'strike' accompanied by violence and constituting an incipient agrarian revolution that threatened to cut off a vital part of the nation's food supply." Queensboro Farm Products v. Wickard, 137 F.2d 969, 974 (2d Cir. 1943). The Act in large part tends to alleviate the problems of the dairy industry by authorizing the issuance of orders regulating the marketing of milk. Such orders may set the minimum prices which handlers must pay for milk and also provide a method by which the desirable fluid market and the burden of the reserve milk may be fairly and proportionately shared among all the dairy farmers supplying any given market.

Footnote 7 - continuation

in the industry as 'surplus' or 'reserve' milk." That statement completely misconstrues the nature of "reserve" or "surplus" milk in federally regulated markets. As indicated above, the purpose of Federal Orders is to insure that adequate supplies of fluid milk exist to meet market demand. The means to this end is to regulate the pricing of fluid milk and equalize, to the extent possible, the

A satisfactory stabilization of prices of fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. Nebbia. v. New York, supra, 291 U.S. at 517, 518.

Thus, although the regulatory scheme under the Act regulates handlers, the statute's basic purpose is to protect producers by insuring them minimum prices with various adjustments to those prices as stated under 7 U.S.C. §608c(5), (18).

Footnote 7 - continuation

burden on producers of having to maintain herds large enough to meet fluid needs with the resultant accumulation of surplus milk which will not go into fluid sales.

The pricing of reserve milk is intended to find utilization for such milk while returning to the farmers the highest returns for such milk. As discussed at length in the Graf-Hammond report (Exhibit 40, 943a-1060a), at page 959a-960a:

The problem of surplus milk pricing is one of providing for orderly disposition of surplus for the short-run as well as the longer time spans. This means that any given time the price must be at a level which will provide manufacturing outlets for the surplus milk. In the long-run, an attempt should be made to obtain prices at the highest level which is consistent with the maintenance of adequate manufacturing resources for the disposition of such surplus in regulated markets. . . .

Reserves are marketed in the form of ice cream or cottage cheese - so-called soft products - or in the form of products such as butter-powder and cheese. These products are sold in local or distant markets, sometimes in competition with products processed

The Act provides both for the classification of milk in accordance with the form in which, or the purposes for which, it is used 8/ and for the fixing of minimum prices for each class use. The basic minimum class prices for milk must be the same for all handlers in a given market, subject to some variation reflecting such factors as transportation.

Footnote 7 - continuation

from manufacturing grade milk, especially with respect to butter-powder and cheese. In establishing a price for surplus milk in a fluid milk market, an important determination is the price being paid to farmers by the competitors of handlers of surplus milk in fluid markets. The general level of competitive prices paid producers at unregulated manufacturing plants is regarded as an indication of the appropriate level for surplus milk prices, in the absence of a clear indication that such prices are not reasonable.

The Nourse Committee in its 1962 report on the Federal order program summarized the objectives in pricing surplus milk as follows: "While pricing surplus milk to avoid 'homeless' milk, extreme care must be exercised to price such milk so that (a) surplus handling is not so profitable as to encourage bringing more milk into the market in order to increase handler profits, (b) surplus is not withheld from Class I usage when needed, and (c) unstabilizing effects upon the markets of producers of manufacturing milk are avoided. (Report to the Secretary of Agriculture by the Federal Milk Order Study Committee, December 1962, p. 26.)

8/ Milk marketing orders establish either a two- or a three-class system for pricing milk utilization. Under either system, Class I includes milk for the fluid market and is the class which received the highest price. The lowest price is imposed on milk for surplus uses, i.e., Class III in a three-class system, Class II in a two-class system. Class II milk in a three-class system receives an

costs and extra quality, 7 U.S.C. §608c(5)(A). The minimum prices set by the Secretary of Agriculture are those which he finds will reflect the prices and available supply of feeds and other economic conditions which affect supply and demand for milk in the marketing areas, and will insure a sufficient quantity of pure and wholesome milk, and will be in the public interest. 7 U.S.C. §608c(18). See United States v. Rock Royal Co-Operative Inc., supra; H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939).

The fluid milk sales and the surplus burden are distributed proportionately among the dairy farmers engaged in production of milk for the marketing area by means of a "market-wide pool," as explained in Grant v. Benson, 229 F.2d 765, 767 (1955):

The purpose of the order . . . is to establish uniform minimum prices to be paid to producers. The first aim is achieved by setting uniform minimum prices for each use classification such as fluid milk, cream, and various manufactured milk products. Thus the price paid by the handler is geared to the use which he makes of the milk. In contrast, the marketing plan is designed to give the producer a uniform price for all the milk he sells regardless of the use made of it by the handlers who purchase it. Several steps are involved in reaching this uniform price. The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adds the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions, including a deduction for payments to cooperatives. The

Footnote 8 - continuation

intermediate price and is processed into products which, in that market, have been determined to share elements common to each of the other classes.

result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payment to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization to the producer-settlement fund.

Even though the farmer or producer has no control over the ultimate utilization of his milk once it enters a handler's plant, the producer nevertheless is assured of sharing equally with all other producers in the return from the higher value fluid milk use in the market. Thus market-wide pooling through the producer-settlement fund, a procedure discussed and approved by the Supreme Court in United States v. Rock Royal Co-Operative, Inc., supra, equates the burden of necessary market reserves and seasonal surpluses always prevalent in a market.

The mechanism by which such orders are promulgated by the Secretary and ratified by the affected producers is established by 7 U.S.C. §608c(3)-(4). These provisions require:

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

The process for amending existing orders is set forth in 7 U.S.C. 608c(17), which incorporates by reference the provisions of section 608c(3)-(4). Upon making such findings and adopting such proposals as he believes are warranted, the Secretary must then submit his proposals or amendments for ratification by producers in the region to be regulated. 7 U.S.C. §608c(9). Milk marketing orders may also be terminated either by action of the Secretary, should he find that any given order or provision obstructs or does not tend to effectuate the policy of the Act, 7 U.S.C. §608c(16)(A), or by the producers, should a majority of the producers in an order area so request, 7 U.S.C. §608c(16)(B). However, only handlers are specifically authorized by the Act to challenge milk marketing orders in both administrative and judicial forums. 7 U.S.C. §608c(15). Thus, the statutory scheme attempts to balance the interest of the producers, the handlers, and the consumers; however, its emphasis is on producers. The amendments at issue here were promulgated pursuant to the statutory requirements and regulations supplementary thereto.

Background of the Rulemaking Proceeding

In accordance with the Act, the Secretary had at the time of the rule making proceeding issued some 61 orders regulating the marketing and pricing of milk in various regions of the country. Order No. 2, which covers the eastern part of New York and the northern part of New Jersey, is a two-class market with: milk used in its fluid state being in Class I, while milk used in manufacturing of other dairy products, such as butter, cheese, ice cream and nonfat dry milk powder, is in Class II. ^{9/} Prior to the amendment in question, the price for Class II milk (also known as "surplus or reserve milk") was the lower of the prices derived from two alternative formulas: (1) the Minnesota-Wisconsin ("M-W" price) Series, which is an average of the actual prices paid for milk by selected manufacturing plants in Minnesota and Wisconsin, and (2) the butter-powder ("b-p" price) formula, which is based on the public prices paid for butter and nonfat dry milk powder. Generally the two formulas have produced fairly similar prices (938a). During the 48 month period from January 1970 to January 1974 the b-p price was above the M-W price 24 times and the converse was true 23 times (200a).

^{9/} While the M-W price is used as a base to calculate the Class I price, appellants here are not seeking to challenge the Class I price directly. However, it should be noted that if the Court determines for any reason that the M-W price is not a valid indication of the price for milk going into manufacturing purposes and that it cannot be used to establish reserve milk prices in Order 2, such decision would also have the effect of invalidating the Class I pricing mechanism.

Beginning in October 1973, however, the b-p prices dropped precipitously below the M-W price due to imports of butter and nonfat dry milk powder (Exhibit 10, 933a & 217a-227a). During the months October, November, December 1973, and January and February 1974, the M-W price exceeded the b-p price by \$0.47, \$0.70, \$1.13, \$1.18 and \$1.19 respectively (1126a). Thus the b-p formula became the determinant of Class II prices. The decline in the price of Class II milk occasioned by this change led producers to request the Secretary to hold hearings concerning the continued efficacy of the b-p formula.

Responding to the producers' request, the Department of Agriculture issued notice on February 12, 1974, to consider proposed amendments to eight orders covering the northeastern part of the country, and to consider whether emergency marketing conditions warranted omission of a recommended decision. As published two days later in the Federal Register, the notice contained 17 proposals for changes in the Class II milk pricing provisions (Notice pp 2a-8a).

The day before the hearing began the Department issued four decisions covering 39 midwestern orders ("the 39 Order Decisions") which eliminated the b-p price from the pricing formulas of the 15 midwestern orders which had used it and made the M-W price the sole determinant of Class II milk prices in all 39 orders.

The hearing on the northeastern orders was conducted in Washington, D.C., for six days between February 20-28, 1974. The hearing record consists of 1094 pages and 46 exhibits. The parties were given eight

days from the conclusion of the hearing to submit briefs. On March 27, 1974, the Assistant Secretary issued a "partial decision" in which he announced an emergency amendment removing the b-p formula as an alternative method for pricing Class II milk from April 2 through July 31, 1974 (1083a-1109a). (39 FR 11567, Mar. 29, 1974). An order issued two days later confirmed the following temporary pricing scheme: the price of milk utilized in manufacturing products other than butter and nonfat dry milk would be the M-W price, and milk utilized in butter and nonfat dry milk production would be priced below the M-W price by the amount, not to exceed 50 cents, that the b-p price was below the M-W price. (39 FR 11980, Apr. 2, 1974). The question of a long term price determinant for reserve milk in these eight marketing orders was postponed until completion of the full rule making process and issuance of a Final Decision and Order.

On June 25, 1974, the Associate Administrator issued a recommended decision that the M-W Series be the permanent basis for determining the Class II milk price. (39 FR 23063, June 26, 1974). Following a period of time for the filing of exceptions, the Assistant Secretary adopted the recommended decision on July 25, 1974 (1125a to 1142a). (39 FR 27678, July 31, 1974). After the requisite two-thirds of the producers approved the decision, an order was issued on August 21, 1974 in conformity with the decision (39 FR 30925, August 27, 1974).

ARGUMENT

I. THE COURT BELOW PROPERLY DETERMINED THAT
THERE EXISTED SUBSTANTIAL RECORD EVIDENCE
TO SUPPORT THE SECRETARY OF AGRICULTURE'S
DECISION TO AMEND ORDER No. 2

A. General Principles

The limited scope of review as to the evidence necessary to support the inclusion of a provision in an order or amendment is well settled. An administrative decision unsupported by "substantial evidence" is arbitrary and capricious, National Labor Rel. Bd. v. Minnesota Min. & Mfg. Co., 179 F.2d 323, 336 (8th Cir. 1950), while a decision based upon substantial evidence" may not be nullified even though the Court itself may have reached a different conclusion. Ibid.; Williapoint Oysters v. Ewing, 174 F.2d 676, 685 (9th Cir. 1949), certiorari denied, 338 U.S. 860; Sterling Davis Dairy v. Freeman, 253 F. Supp. 80, 82 (D. N.J. 1965). The Court must not exercise independent judgment in a case which could fairly have been decided either way upon the record. Universal Camera Corp. v. Labor Bd., 340 U.S. 474, 488 (1951); Easttam v. Secretary of Health, Education and Welfare, 364 F.2d 509, 513 (8th Cir. 1966).

"Substantial evidence" has been variously defined, but it is often explained as it was by the Court in Carlay Co. v. Federal Trade Commission, 153 F.2d 493, 496 (7th Cir. 1949):

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of proof which induces

conviction and makes a lasting impression on reason. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126; National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299, 59 S.Ct. 501, 83 L.Ed. 660; National Labor Relations Board v. Thompson Products, Inc., 6 Cir., 97 F.2d 13, 15. The rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence does not go so far as to justify orders without a basis in evidence having rational probative force.

The Court must consider the entire administrative record, including that which "fairly detracts" from the administrative decision (Universal Camera Corp. v. Labor Board, supra, 340 U.S. at 488; Williapoint Oysters v. Ewing, supra, 174 F.2d at 685), and thus must engage in a process of weighing the evidence. This requirement was now, however, intended to negate the function of the agency as the body "presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." Universal Camera Corp. v. Labor Board, supra, 340 U.S. at 488. As the Court explained in Williams v. Haurigan, 244 F. Supp. 478, 481 (D.S.D. 1965), quoting from National Labor Relations Board v. Falls City Creamery Co., 207 F.2d 820, (8th Cir. 1953): "Evidence is weighed--

not to determine whether the evidence supporting the Board's finding is more convincing or of greater weight than evidence to the contrary, but for the purpose of comparing both and determining whether by comparison the evidence followed by the Board is substantial when compared with all the evidence in the record on the subject.

B. The Record Evidence In Support of Deleting the b-p price from Order No. 2.

As we now show, the Court below properly found that the record evidence supports not only the substantial changes made by the Secretary but also the need to take emergency action to implement those changes in view of the situation which existed at the time of the February 20-28, 1974, rule-making hearing. 10/

10/ The Court stated in its Decision:

After a thorough examination of the record, the court finds that there is "firm basis" to support the conduct of the proceedings on an emergency basis. The record contains substantial evidence of the serious problems confronting producers in the Order No. 2 area and of the potential for disruption of normal marketing channels as a result of the 39 order decisions covering most of the remaining marketing areas of the country.

The first factor supporting expedited procedures was the deteriorating state of marketing conditions then present in the Order No. 2 region. In the year prior to October, 1973, costs to the dairy farmers had increased 20% while prices were going up only 10%. A comparison of October 1973 with the previous October showed a decline of 1,483 producers and 39,248,897 pounds of production. If the trend were allowed to continue, shortages of milk would have been the likely result.

Actions by the federal government added to the difficulties faced by the dairy farmers. Huge shipments of butter and nonfat dry milk powder were allowed to be

Two producer groups, National Farmers Organization and Pennmarva Dairymens' Cooperative Federation, Inc., both of which had members in

Footnote 10 - continuation

imported into the country. As a result, the butter-powder price dropped uncharacteristically far below the M-W price. At the time of the hearing there was no indication of a change in the governmental policy favoring imports.

In essence, this meant that dairy farmers were facing hard times and needed some means of overcoming the resulting problems. When the M-W price rose dramatically at the end of 1973 they realized that they could overtake rising costs by using that price alone. From October 1973 to January 1974 dairy farmers regulated by Order No. 2 received \$10,700,000 less under the b-p price than they would have obtained if the M-W price had been in effect. If price relief were not given immediately, more producers would drop out of the picture.

* * *

The second factor in favor of the expedited procedures was the disparity in prices paid for reserve milk in the northeast as opposed to the prices in the majority of orders throughout the rest of the country. The 39 order decision had recently added 15 orders to the 27 which already used the M-W price as their sole pricing mechanism. Maintaining the b-p price in the northeast would have disrupted marketing channels and led to dislocation of production facilities for the competition in reserve milk was nationwide. Eliminating the b-p price in the northeast, on the other hand, would immediately provide a strong foundation for orderly marketing, for then over 85% of the nation's butter, cheese and nonfat dry milk powder would be [produced from milk] priced uniformly.

* * *

These factors taken together present sufficient reason for the expedited action by the Secretary.

the New York-New Jersey marketing area 11/, introduced evidence that while there had been an increase in the price for milk being paid farmers, it was not sufficient to keep up with the farmers' increased costs of production (17a, 211a). It was the position of producer groups that the inadequate returns to farmers from the pricing of reserve milk at the b-p price was further aggravating the price squeeze on dairy farmers and was resulting in an increasing number of farmers being forced out of

Footnote 10 - continuation

Substantiality of the Evidence

The finding of substantial evidence in support of the procedural aspects of this case goes far toward establishing that there was substantial evidence in support of the Secretary's substantial decision. Since the "emergency" centered around the continued use of the b-p price in northeast orders, it was reasonable to resolve the emergency by eliminating that price from the pricing formula.

11/ Appellants have argued in the Court below that their challenge goes only to the amendment of Order No. 2 and therefore any evidence produced at the rule making hearing regarding the conditions in the other seven orders is irrelevant. While the government is willing to emphasize those portions of the record which specifically relate to Order No. 2 to demonstrate that there was in fact substantial evidence supporting the amendment to that order, we do not agree that the evidence presented regarding the other seven orders is irrelevant to the amendment of Order No. 2. The rule making proceeding involved all eight marketing orders. Additional substantial record evidence regarding general conditions in the northeast is set forth by the Administrative Law Judge in his Initial Decision, with citations to the rule making record, at pages 1299a-1305a.

the dairy business (734a). Evidence was introduced to demonstrate that in the northeast there had been substantial declines in the number of producers and the amount of milk produced over the preceding five year period (16a-17a, 230a). Milk throughout the country was generally in short supply (279a), and there was testimony that there had been some shortages of milk for fluid use in the Order No. 2 area during the prior year (254a).

Additional evidence was presented that the b-p price was providing substantially less returns to farmers than they would have enjoyed had the milk been priced at the M-W price. Farmers in Order No. 2 alone had lost some 10.7 million dollars or approximately \$.38 on every hundred-weight of milk produced over the preceding four month period (228a). Mr. Mathis of the Eastern Milk Producers' Cooperative Association, Inc., testified that pricing of reserve milk at the b-p price was substantially depressing the blend price going to farmers and wiping out any gains made through the increases in the Class I price being paid for fluid milk (229a).

Furthermore, the record evidence indicated that the b-p price no longer served its intended function and had little relevance to the value of reserve milk going into manufacturing of dairy products in Order No. 2. The b-p price had been originally introduced as an alternative to the M-W series price in order to provide a mechanism for clearing the market of unneeded reserve milk by insuring that the annual price level

for reserve milk in the region would not rise above a fixed margin under the market value of butter and nonfat dry milk powder. (33 FR 7184, May 15, 1968). However, due to changes in production patterns the quantity of reserve milk had greatly declined throughout the northeast and therefore reserve milk was no longer a burdensome problem (232a). Not only had there been a reduction in the overall amount of reserve milk in Order No. 2, but there had also been a substantial reduction in the percentage of that reserve milk actually going into butter and nonfat dry milk powder. In the three markets of New York-New Jersey, Boston Regional and Eastern Ohio-Western Pennsylvania, milk used in butter and powder comprised 25.7 percent of all Class II milk in 1970 but only 11.7 percent of all Class II milk by the first quarter of 1973 (233a-234a). Therefore, not only had the need for the b-p price largely vanished, but its presence actually became a detriment because it did not reflect the use value of the major portion of reserve milk going into manufactured dairy products in Order No. 2.

There existed further support for the need to amend the eight northeastern marketing orders to drop the b-p price as an alternative to the M-W price in the fact that the Secretary had issued the 39 Order Decision on the day prior to the commencement of the February 20-28 rulemaking hearing. That decision, in effect, meant that the M-W price would be the price determinant for milk going into manufacturing uses for the majority of Federally regulated milk marketing orders as well as

the unregulated manufacturing plants in Minnesota and Wisconsin. Had there been no amendment to the eight northeastern marketing areas and had the disparity between the b-p price and the M-W price continued at the rate it was going at the time of the hearing, reserve milk in the northeast would have been priced at over a dollar less per hundredweight than the majority of milk used in manufacturing across the nation. As found by the Court (1464a), amending the eight northeastern marketing orders to delete the b-p price, on the other hand, resulted in the milk used to manufacture over 85% of the nation's butter, cheese and nonfat dry milk powder being priced uniformly (735a).

It is evident from the above that there existed substantial evidence on the record to support the Secretary's decision to amend Order No. 2 to delete the b-p price. Little milk in Order No. 2 was going into butter or nonfat dry milk powder and therefore the b-p price, which reflected solely the value of butter and powder, did not reflect the use value of the majority of milk going into manufactured dairy products in the market. The b-p price had, as the Court below found, outlived its usefulness and had become a distinct liability to the producers in the area. Grade A milk producers in Order 2 were in effect receiving less for their milk which went into manufactured dairy products than were producers in Minnesota and Wisconsin which supplied plants with milk that did not have to be Grade A. The b-p price as determinant of the value of reserve milk in Order 2 was substantially depressing the blend

price to the producers and destroying the gains they had obtained through increases in the price for fluid milk. The depressing effect on the blend price coupled with the increases in the producers' costs threatened to force more producers out of the dairy industry and to escalate further the already existing pattern of decreasing numbers of producers and declining supplies of milk. Such losses constituted a real threat to the necessary supply of fluid milk, and there had in fact been some shortages of fluid milk in Order No. 2 during the prior year. To effectuate the declared policies of the Act and to insure sufficient supplies of fluid milk, the Secretary acted to amend Order No. 2 to delete the b-p price. The Court below, having determined that substantial evidence existed to support that decision, correctly ruled that the Secretary had acted "in accordance with law". Lewes Dairy, Inc. v. Freeman, 401 F.2d 308, 317, 319 (4 Cir. 1968).

C. Evidence In Opposition to Deletion of the b-p price From Order No. 2.

Appellants, at page 8 of their brief, argue that even if the M-W price is a valid measure of the price being paid for milk used in manufacturing in Minnesota and Wisconsin, deleting the b-p price from Order No. 2 was improper because it places them at an economic

disadvantage. They assert that in addition to the actual cost of the milk they must also pay for the cost of the operation of the marketing order and transportation costs. Furthermore, they allege that, because of differences in the chemistry of the milk, they cannot obtain the same amount of product as the plants in Minnesota and Wisconsin. (Appellants' Brief, pages 12 & 13). 12/ Appellants do not, of course, discuss the advantages they enjoy from being located within the area of their major market nor the extent of the advantage they enjoyed during the period immediately prior to the rule making hearing when Order No. 2 handlers were able to purchase milk at the b-p price while virtually the rest the country had to pay the higher M-W price. (See footnote 19 and testimony of Mr. van Zanenberg, Vice-President of Cuba Cheese and Trading Company, pp 342a). In any event, even if appellants were disadvantaged by the Secretary's amendment to Order No. 2, it would not be a basis for overturning that decision. As stated in United States v. Mills, 315 F.2d 828, 838 (4th Cir. 1963) cert. denied, 375 U.S. 819: "Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the

12/ Additional evidence submitted in opposition to the deletion of the b-p price was submitted by Lehigh and other interested parties including producer groups which operated butter and nonfat dry milk powder manufacturing facilities. This evidence is summarized by the Administrative Law Judge in his Initial Decision at pages 1304a and 1305a with citations to the rule making record.

variables are too numerous' he 'fulfills his role when he makes a reasoned' order. Mitchel v. Budd, 350 U.S. 473, 480 (1956)"; see also United Milk Producers of New Jersey v. Benson, 225 F.2d 527 (D.C. Cir. 1955).

In short, the case at bar falls squarely within the four corners of the above requirements of the substantial evidence rule and was properly so held by the Court below.

THE COURT BELOW PROPERLY FOUND THAT A CHALLENGE
TO THE VALIDITY OF THE MINNESOTA WISCONSIN SERIES
PRICE WAS NOT WITHIN THE SCOPE OF THE RULEMAKING
PROCEEDING

Notwithstanding the abundance of evidence supporting the need to remove the b-p price formula as an alternative to the M-W price, the handlers' main argument here is that there was no substantial evidence supporting the amendment to Order No. 2 because there existed doubt as to the validity of the M-W price formula. They contend that in removing the b-p price formula the Secretary was, in effect, imposing the M-W price as the sole determinant of the value of reserve milk in the northeast and he should not be allowed to do so without first establishing on the record the validity of that M-W price.

The Court's decision dealt with appellants' argument in two succinct paragraphs (1466a):

Plaintiffs nevertheless argue that the amendment was not supported by substantial evidence because there is doubt about the validity of the M-W Series. In particular they point to the Secretary's admission

that there is no regular effort to verify the prices which comprise the Series. They also contest the Secretary's refusal to produce evidence of its validity.

The flaw in this argument is that the hearing did not concern the question of dropping the M-W Series. All of the 17 proposals examined at the hearing retained the M-W Series in the pricing formula. In fact, the handlers supported the M-W Series, as long as the b-p snubber was also maintained. The M-W Series, in effect, was a "given" of the hearing. A challenge to its validity was beyond the scope of the hearing.

We submit that the Court was entirely correct in this determination.

Initially, it is exclusively the duty of the Secretary of Agriculture to determine what proposals may effectuate the policies of the Act so as to warrant their consideration at a rulemaking proceeding. (see Rules of Practice, Title 7 Code of Federal Regulations Part 900 section 900.3). Handlers' efforts at the rulemaking hearing to put in issue the validity of the M-W series price was an attempt to introduce collateral matters, and the Secretary was fully within the scope of his authority in rejecting such proposals.

As stated by the District Court for the District of Columbia in the unreported case of Marketing Assistance Program, Inc. v. Butz, Civil Action No. 76-419 (D. D.C., June 29, 1976), affirmed ____ F.2d. ____ (D.C. Cir. 1977):

The Secretary's discretion in defining the scope of the hearing is broader than the strictures placed upon the issuance of a final order. Section 608c(3) clearly contemplates a winnowing process when alternative, conflicting orders are proposed to the Secretary as the subject for a hearing. This subsection also should apply to collateral proposals for inclusion into any notice order, . . . If the Secretary were unable to limit the scope of the hearing in this manner, interested parties could crowd the docket with a variety of proposals solely for the purpose of obfuscation.

Furthermore, as found by Judge Neaher, the fallacy of Appellants' argument is that the M-W price was already a part of Order No. 2, and all sixteen of the proposals under consideration at the rule making proceeding would have retained the M-W price. 13/ The Court is fully correct that the M-W price was in fact the "given" of the rule making hearing and was not a new element which had to be validated on the basis

13/ The sixteen proposals varied considerably. As summarized by the Administrative Law Judge in his Initial Decision at pages 1296a-1297a, they were to price reserve milk generally:

a. Based solely on the M-W price (Proposals 1, 2, 3, 4, 10, and 11).

b. Based solely on the M-W price during July through March, and based on the lower of the M-W and b-p prices during April through June (Proposal 5).

c. Based on the average of the M-W and b-p prices, except milk utilized in butter and skim milk powder which was to be priced at the lower of the M-W or b-p (Proposals 6, 7).

d. Based on the M-W price, except milk used to produce butter and skim milk powder which is to be priced at the b-p (Proposals 8, 15, 16).

of substantial record evidence. The use of the M-W series price was essentially the retention of the status quo, and as ruled by the Court in Abbott's Dairy, Division of Fairmont Foods v. Butz, 421 F. Supp. 415, 420 (E.D. Pa. 1976), maintenance of the status quo under an order does not constitute "the issuance of an order or amendment to an order" within the meaning of the Act and therefore does not require substantial record evidence.

Appellant's assertion that it is incumbent upon the Secretary of Agriculture to introduce evidence supporting the validity of the M-W series price not only goes beyond the scope of the rule making proceeding, but also misconstrues the neutral role of the Secretary in the promulgation of amendments to marketing orders. Rulemaking hearings are conducted to permit various proponents and opponents of given proposals to come forward to bring to the Secretary's attention such information as they may have, and not to elicit information from the Secretary or the various parties participating in the proceeding. United States v. Wrightwood Dairy Co., 127 F.2d 907 (7th Cir. 1942).

The Secretary's refusal to provide Appellants with the names of the specific plants whose reports are used to construct the M-W price in no way constitutes a denial of due process. The appellants may attempt

Footnote 13 - continuation

In addition proposal 9 requested emergency consideration of the proposed amendments, while 12, 13 and 14 concerned other aspects of reserve milk pricing and classification.

to obtain information concerning the makeup of the M-W price under the provisions of the Freedom of Information Act, 5 U.S.C. 552; however, it is well established that there is no provision for discovery in rule making proceedings. As stated by the Court in American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir. 1966):

*** rule making is a vital part of the administrative process, *** is not to be shackled, in absence of clear and specific congressional requirements, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

There is no denial of due process by an agency's refusal to grant discovery requests when the proceedings do not contemplate such a right.

See Coger v. Schuyler, 464 F.2d 747, 755 (D.C. Cir. 1972).

While the validity of the M-W price formula was not an issue within the scope of the rule making proceeding, several participants did express concerns about its continued validity, and Appellants and Lehigh both took issue with the validity of the M-W price when they filed their exceptions to the proposed Final Long Term Pricing Decision. 14/ Relying

14/ As their regimental standard in their campaign to discredit the M-W price formula, the handlers here have steadfastly waived the much proffered Deposition of Mr. Dwight Morris, a retired officer of Associated Milk Producers, Inc. (AMPT) (Appellants Brief pages 16 & 24). This deposition, while not available at the time of the rule making proceeding, eventually became part of the record as an attachment to appellants' and Lehigh's Exceptions to the Proposed Final Decision. This document has been touted by Appellants as "the first proof to substantiate the suspicions about the M-W Series." However, the Administrative Law Judge, after considering both the Morris Deposition

in part upon information introduced at the rulemaking proceeding 15/ and in part upon judicial notice of pamphlets published by the Statistical Reporting Service (SRS) of the Department 16/, the Assistant Secretary in issuing the Final Long Term Pricing Decision and Order fully considered all expressed concerns and replied to all exceptions raised (1130a-1131a and 1135a-1136a). Under the terms of the Administrative Procedure Act the Secretary is required to do no more. See American President Lines, Limited v. N.L.R.B., 340 F.2d 490 (9th Cir. 1965).

Footnote 14 - continuation

and an Affidavit by Mr. Robert March of the Agricultural Marketing Service of the Department, which was permitted to be filed in the administrative review in response to the Morris Deposition (see Order of the Administrative Law Judge in AMA Docket No. 2-46 et al., dated November 12, 1974), found that:

The March affidavit satisfactorily refutes any implication of M-W manipulation. Said affidavit states: that the M-W price series is based upon reports from a large number of plants; that higher prices paid at a small group of plants would have little if any influence on the average price for manufacturing grade milk in the states of Minnesota and Wisconsin; that the Department was apprised of the intent to pay a price in excess of the prevailing average value of milk for manufacturing in 16 out of a total of 754 plants; that the prices were monitored closely; and that the prices paid by the 16 plants were within the range of prices paid by other plants and had no significant impact on the M-W price.

Appellants argue at page 23 of their brief that the Court below "apparently misconceived the relationship between the two formulas, and thus the basic issue in the case." Appellants further state (Ibid.):

As we have previously shown, the butter-powder formula was based upon the publicly-negotiated prices of those products on the Chicago Commodities Exchange. In the industry, that formula was called the 'snubber', a borrowed nautical term meaning in this instance that it served to prevent the secret M-W from running out of control.

The argument is sophistry. The Court below did not misconceive the relationship between the formulas. The Court below properly found that the sole purpose of adding the b-p price as an alternative to the M-W price was to clear burdensome supplies of reserve milk from the market

Footnote 14 - continuation

The Morris Deposition is a remarkable document in that not only does Mr. Morris indicate that attempts were made to manipulate the "secret M-W formula price" (to use Appellant's language) but that efforts were also made to influence the "Green Bay Cheese Exchange" price, a so-called "public pay price" which was suggested by Mr. van Zwanenberg, the vice-president of one of the appellants here, as an alternative to the M-W price formula during his testimony at the rulemaking hearing (341a). Mr. Morris stated that AMPI had made efforts to influence the Green Bay Cheese Exchange "because it was our feeling that the cheese trade had been doing just the reverse in manipulating the price of cheese down from times going back to the last century" (Administrative Record Part I, Item Number 39).

by assuring that the price for reserve milk would not rise above a fixed margin under the value of butter and nonfat dry milk. (See Mathis

Footnote 15 - continuation

15/ The Graf-Hammond study contains substantial analysis of the M-W price formula (980a-1020a) including a discussion of the "State Programs To Assure Accurate Payment For Milk" (1040a-1048). In addition Mr. Cotter of Lehigh Valley Farmers Cooperative read into evidence portions of a letter from Mr. Trelogan of the Statistical Reporting Service of the Department, which also discussed the construction of the M-W price formula (585a-590a, also introduced as Exhibit 33, 941a-942a). Mr. Cotter had written a letter to the Department expressing his concern that dual access plants, which are plants having both a Class I fluid operation and a Class II manufacturing operation, were using their returns from their fluid sales to bid up the prices they were paying for milk used in their manufacturing operation, and then reporting the latter prices to the state authorities compiling the information for the computation of the M-W price formula in order to influence that formula. Mr. Trelogan's response included a chart (558a) which indicated that in 1970 dual access plants had in fact paid less for their milk than straight manufacturing plants.

Footnote 16 - continuation

16/ In the final Long Term Pricing, Decision and Order the Assistant Secretary took judicial notice, in accordance with the provisions of 5 U.S.C. 556(e) and section 900.8(d) of Title 7 of the Code of Federal Regulations, of the SRS Pamphlet "Agricultural Prices, April 1974" (pp 1061a-1075a) which contained an updated chart similar to the one provided by Mr. Trelogan (558a) and which indicated that in 1973 dual access plants again paid slightly less for their milk in Minnesota and Wisconsin than did straight manufacturing plants. The Assistant Secretary also took judicial notice of the SRS pamphlet "Prices Received by Farmers for Manufacturing Grade Milk 1970-1972" (pp 1076a-1082a) which discusses at length the construction of the M-W price formula. That pamphlet also sets forth charts which indicate that for the three year period 1970-1972 the estimated M-W price when compared with the reported actual pay price showed a difference of only 1 cent.

testimony 218a and 33 F.R. 7184, May 15, 1968). 17/ There was never any intention that the b-p price would serve as any type of a governor on the M-W price because it could not fulfill such a function. The b-p price only represents the value of butter and nonfat dry milk powder and does not take into account the value of cheese, ice cream or other products (see Graf-Hammond Study 969a-979a comparing the function of product price formula (b-p price) vis a vis competitive pay price formula (M-W price)).

17/ The situation which gave rise to the adoption of the alternative pricing formula in Order No. 2 in 1968 was not unlike the conditions which existed at the time of the 1974 amendment hearings. At that time the price determinant for reserve milk in Order No. 2 was the "U.S. average manufacturing price." The New York-New Jersey market was in a state of flux with the procedures and handlers changing over from transporting milk in cans to bulk transportation. Foreign butter-sugar mixtures were being imported in large quantities for use by ice cream makers in the northeast in lieu of domestic butter and cream. The combination of these factors had resulted in seriously depressing the value of the domestic cream powder market. Recent changes in import quotas restricting the amount of foreign butter-sugar mixture which could come into the country promised some help, but handlers in the area argued that the Class III price as it existed was too high and the butter and powder manufacturers in particular were in somewhat desperate straits. Accordingly, a hearing was called to consider amending the price determinant for reserve milk in Order No. 2 and five nearby northeastern orders.

The Secretary, while finding that there was no evidence to support the handlers' claim that the Class III price was too high, determined that it would better effectuate the declared policies of the Act to amend these orders to make the M-W price, qualified by the b-p price "snubber", the price determinant for reserve milk in these five marketing areas. The Decision and Order states that the purpose for

Appellants' entire attack on the validity of the M-W price is derived from their desire to enjoy the competitive advantages available under the alternative pricing formula. Initially, they stood to enjoy a significant advantage in raw product costs as a result of the lower b-p price, and they expected that such advantage would continue. In the long run, even if the significant disparity between the M-W price and the b-p price disappeared, as in fact happened in April and May, 1974 (1193a), the past history

Footnote 17 - continuation

employing the b-p price whenever it was lower than the M-W price was to avail some degree of protection to handlers manufacturing butter and powder against undue reductions in their operating margins when butter values were abnormally low. The b-p price as established in other Federal orders provided a \$. 48 make allowance and would "protect handlers from any recurrence of severely depressed margins which they experienced in 1966 when open market prices were above support levels." (33 F.R. 7187, May 15, 1968).

It is further stated the M-W price with the b-p price "snubber" would grant "producers . . . assurance that the existing average price level would be retained." (33 F.R. p. 7187, May 15, 1968).

Far from constituting any sort of a governor on the M-W price, the b-p price "snubber" served solely to protect butter and powder manufacturers, of whom there were a considerable number in 1968, from unduly low operating margins when the price for butter and powder were out of line with the value of milk going into other dairy products. In extending this degree of protection to butter and powder manufacturers, it was felt that these facilities would be retained in operation within the Order area and would insure an outlet for reserve milk which had no higher use value.

We would further note that handlers apparently saw no reason to challenge the validity of the M-W price in 1968, notwithstanding the fact that the 1968 Decision and Order contain no more information regarding the construction of the M-W price formula than did the 1974 amendment Decision and Order.

of the two price formulas indicated that appellants could anticipate a price advantage whenever the b-p price fell below the M-W price. Appellants were not seeking and are not here seeking the abolition of the M-W price because then all handlers would be in the same bargaining position. Appellants merely wish a return to the alternative pricing formula in Order No. 2 and that such formula would retain the M-W as one of the pricing elements. 18/ This Court is being asked to accept the premise that there is no evidence to support the use of the M-W price

18/ Whether or not the Court's vacating the 1974 amendment to Order No. 2 would have the desired affect Appellant's want is open to question. Should the Court find that absent establishment of the validity of the M-W price, through full disclosure of the names of all reporting plants, their pay prices, distribution and the other information requested by the Appellants, that formula can not be the price determinant for reserve milk, it is difficult to see how it could still be employed as one of the elements under the former alternative pricing formula.

On the other hand, the Secretary's decision in 1974 found that the b-p price did not effectuate the declared policies of the Act, and unless the Court finds that determination was not supported by substantial evidence, the b-p price can not be used as the price determinant for reserve milk either alone or as an alternative to the M-W price.

It would appear then that if the Court finds the M-W price is invalid and the Secretary has found that the b-p does not effectuate the purposes of the Act, Order No. 2 at least, and more likely all of the Federal marketing orders, would be left without a pricing mechanism for determining the value of reserve milk. Without a price for reserve milk to serve as the basis for calculating Class I prices, there can be no milk pricing at all. Since marketing orders are meaningless if they can not establish minimum prices there would be no choice but to return to a free marketing economy for at least some period of time until a new pricing mechanism was established through rule making.

as the sole price determinant for reserve milk in Order No. 2 but that at the same time the M-W may be employed under the alternative pricing formula whenever it favors handlers' interests. We request the Appellate Court to reject this premise and affirm the holding of the District Court below.

THE COURT BELOW PROPERLY FOUND THAT
THE RECORD EVIDENCE SUPPORTED THE
SECRETARY'S DECISION REGARDING THE
NEED FOR PRICE ALIGNMENT

Appellants argue that there was no substantial evidence to support the Court's finding that the Secretary properly amended Order No. 2 to align the price for reserve milk used in manufacturing with the prices established for reserve milk in the majority of other Federal marketing orders and the price being paid by the unregulated plants in Minnesota and Wisconsin. Appellants ignore the testimony at the rule-making hearing that manufactured dairy products compete on a nationwide basis (33a, 82a) and that handlers able to purchase milk at the b-p price enjoyed a substantial competitive advantage over those handlers forced to pay the M-W price due to the disparity existing at the time of the rulemaking hearing. 19/

19/ Mr. Berkhahn of the National Farmers Organization testified at the rule making hearing (28a-29a):

In addition to our concern for the reduction in the blend price and the resultant loss of income, there is another urgent reason why this provision should be suspended immediately.

Furthermore, the Appellants take the unique position that because the 39 Order Decision was not available to them in its entirety at the rule making hearing the Secretary could not rely on that decision to determine that it was necessary to align the price for reserve milk between the eight northeastern orders and those 39 orders. As found by the Court below, the essential fact to come out of the 39 Order Decision was that the M-W price would be adopted as the sole determinant for reserve milk pricing in those orders and everyone was aware of that fact. All participants at the February 20-28 rule making hearing knew

Footnote 19 - continuation

If this provision is allowed to remain in the order it will have a domino effect and will, without question, seriously erode the Basic Formula or Minnesota-Wisconsin Series Price for this reason.

This continuance of the butter-powder formula in these orders will result in processors who manufacture Class 2 or 3 products from lower priced milk having a competitive advantage over processors of like products produced from Class 2 or 3 milk priced on the Minnesota-Wisconsin Series Price.

Cheese produced from milk regulated in the butter-powder formula areas has an approximate 10 cents per pound price advantage over the same type of cheese produced in the Minnesota-Wisconsin regulated orders.

Nonfat drymilk produced from milk regulated in the butter powder formula orders has an approximate seven cents per pound advantage over powder produced in the M-W regulated orders.

Butter produced from milk regulated in the butter-powder formula orders has an approximate 15 cents per pound advantage over butter produced in the M-W

by the end of the first day that the majority of federal marketing orders would henceforth be paying the same price for milk going into manufacturing as were the plants in Minnesota and Wisconsin. That fact alone, coupled with the existing disparity of over a dollar between the b-p price and the M-W price in January and February 1974, was sufficient to portend dangerous disruption of existing marketing patterns and to support the Secretary's decision that amendments were necessary to prevent such disruption. 20/ As stated by the Court in Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620 (1965):

Footnote 19 - continuation

regulated orders. I might add here that as far as these figures are concerned they could be adjusted and come out with the same results, depending on whether or not you wanted to assess more of a loss to one product than to the other.

But this relationship would be maintained, as far as the difference is concerned.

Mr. Avila from NFO testified that producers in the midwest had recently told NFO either to lower its price for milk or get the milk out of their plants because they were being undercut on the finished product by five cents per pound on cheese.

20/ The record also contains the following testimony from Dr. Johnson, on behalf of the New York-New Jersey England Dairy Cooperative Coordinating Committee, representing approximately 20,000 dairy farmers, some 50% of all producers shipping

'[s]ubstantial evidence' is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (citations omitted) ... 'This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence'. . . (citations omitted)

As long as there existed a rational basis on the record, the Secretary could anticipate market disruption and take steps to align prices for reserve milk to minimize or prevent such disruption. Fairmont Foods Co. v. Hardin, 442 F.2d 762, 772 (D.C. Cir. 1971). There was in part

Footnote 20 - continuation

to plants under the Boston Regional, Connecticut, New York-New Jersey and Middle Atlantic Orders (397a-398a):

The immediate problem is that the butter-powder value of milk is now much less, by far the smallest in recent years or perhaps ever, than the pay price at the Minnesota-Wisconsin plants for manufacturing grade milk

* * *

With some orders in the country using a butter powder snubber for Class II pricing and others not, the wide departure of the butter-powder value from the M-W price present serious problems of price alignment

And Mr. Eldie Vickrey, General Manager, Miami Valley Milk Producers Association, Dayton, Ohio, testified (482a-483a):

The milk should be priced at the price for which, by necessity, it is used. If the Orders are not amended the wide variance between the Minnesota-Wisconsin and butter powder price will continue

evidence on the record that the disparity between the b-p price and the M-W price was resulting in disruption of orderly marketing conditions between contiguous order areas with overlapping milk sheds. 21/

Footnote 20 - continuation

to provide the opportunity for milk to be attached to the Order for pooling purposes, yet not be readily available for Class I use.

It would be priced at the Class II or Class II price and sold most of the months, to a cheese operation at a price somewhat higher than the cost under the order. It is our contention that the pricing provisions of the Federal Orders should be such as to encourage any and all milk that is to be pooled under the Orders to be available for Class I use.

21/ Gerald J. Gehling testified on behalf of Associated Milk Producers Inc. (AMPI), at pages 250-251 of the rule making record:

Chronic misalignment has resulted in common procurement areas due to the butter-powder disparity. On an average, the Indiana blend is 35 to 40 cents out of alignment in common procurement areas of Order 30 - Chicago - in Wisconsin and Illinois.

As can be expected, Indiana producers have transferred to these higher paying outlets.

The Indiana market cannot afford the loss of its normal supply of milk. As it is supplemental milk supplies have had to be imported from reserve areas to fulfill the demand of fluid requirements for this market.

As found by Judge Neaher: "[m]aintaining the b-p price in the north-east would have disrupted marketing channels and led to dislocation of product facilities for the competition in reserve milk was nationwide" (1464a). Aligning prices between the eight northeastern orders and the majority of other federal orders as well as the unregulated plants in Minnesota and Wisconsin was the most reasonable means of preventing potentially large scale disruption of orderly marketing conditions and was a proper function of the Secretary. 22/ See Sunny Hill Farms Dairy v. Hardin, 446 F.2d 1124, 1128 (8th Cir. 1971).

Footnote 21 - continuation

See also testimony at 484a-485a and 492a regarding importance of orderly marketing between Orders 33 and 49; and statement of Ricardo Avila of National Farmers Organization, at page 733a.

22/ Appellants also ignore the fact that the Secretary has before him not only the present record but the records of all former amendment hearings dealing with Order No. 2. In the Secretary's "General Findings" it is stated:

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders, except Indiana, and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

CONCLUSION

For the above stated reasons the Court below correctly found that "the Secretary properly exercised his authority in this case, for there is substantial evidence in the record and his actions were in accordance with law", and we respectfully submit that the Court's decision should be affirmed.

Respectfully submitted,

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(On the Brief)

Footnote 22 - continuation

In the 1968 amendment to Order No. 2 and five other northeastern milk marketing orders (33 F.R. 7184, 7187), it is stated:

The proposals to provide for identical amendments to all of the Northeast orders should be adopted. Virtually all of the witnesses urged that if any change were made in the New York-New Jersey Class III price formula, such change should also be made in each of the other orders to maintain appropriate price alignment among the markets. The need for alignment of surplus milk prices under the orders was set forth in the April 25, 1962, decision of the Under Secretary (27 F.R. 4511), pursuant to which the present common surplus pricing formula in the orders was established. The findings and determinations in that decision relative to providing identical surplus price formulas in the orders continue to be valid and are hereby reaffirmed.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 13th day of October 1977 he served a copy of the within
Brief of Federal Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Booth, Lipton & Lipton, Esqs., 405 Park Ave., N.Y., N.Y. 10022

Simpson, Tocher & Bartlett, Esq., One Battery Pk. Plaza, N.Y. N.Y. 10004

David C. Toomey, Esq. Duane Morris & Heckscher, 1600 Land Title Bldg. 100 So. St

Phila. Pa. 19110

and deponent further says that he sealed the said envelope and placed the same in the mail chute

drop for mailing in the United States Court House, 225 Cadman Plaza East
~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores M Byrd

Sworn to before me this

13th day of October 1977

Barbara A Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979